No. 14361

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

V. E. Stanard, individually and doing business under the firm name and style of Male Merchandise Mart,

Appellant,

vs.

Otto K. Olsen, individually and as Postmaster of the City of Los Angeles, State of California; and Doe I through Doe IV,

Appellees.

APPELLEE'S OPENING BRIEF.

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Otto K. Olsen, individually and as Postmaster of the City of Los Angeles, State of California; and Doe I through Doe IV,

Appellees.

APPELLEE'S OPENING BRIEF.

Introduction.

This appeal relates primarily to the question of whether or not an Impound Order of the Postmaster General is reviewable in the District Court before the Post Office Department has conducted an administrative hearing and made a final administrative determination thereon; and secondarily, to the question of whether or not the Postmaster General has authority to make an Impound Order prior to hearing.

Statement of Jurisdiction.

If the District Court did have jurisdiction, it had it by virtue of 5 U. S. C. A. 1009(c). That it did not have jurisdiction, however, is one of the principal bases for the District Court's decision in this case, and so will be treated at some length under the heading "Argument."

The jurisdiction of this Court is based on 28 U. S. C. A. 1291.

Statement of the Case.

The appellant, V. E. Standard, is engaged in the business of distributing and selling through the mail certain publications and novelties under the firm name of Male Merchandise Mart. The general procedure followed by the appellant is to send out illustrated advertising circulars to prospective purchasers, inviting orders for the materials advertised in the circulars.

The Post Office Department, through its inspectors, uses "test" names, which eventually become included on mailing lists which are used by mail order operators such as the appellant. It is in this fashion that the Postmaster General receives these advertising circulars, though many are sent to him by interested members of the public who have also received them.

After receiving some of the appellant's advertising circulars, the following developments have taken place in this case:

March 1, 1954— The Postmaster General examined the appellant's advertising circulars and determined that they constituted evidence satisfactory to him that the appellant was depositing or was causing to be deposited in the United States mails information as to where, how and from whom obscene, lewd, lascivious, indecent, filthy and vile articles, matter, things, devices, and substances may be obtained. As a result, the Postmaster General made an order instructing the Postmaster at Los Angeles to impound all mail addressed to the appellant pending a hearing and final administrative decision. On the same date the appellant was given notice that a hearing would be held on March 17, 1954.

March 10, 1954—The appellant's attorney went to Washington, D. C., and at his request the hearing was held on that day.

March 19, 1954—The appellant filed a Complaint in the District Court (Stanard v. Olesen, 16522-HW) wherein the appellant prayed for an Injunction and declaration of invalidity of the Impound Order. An Order to Show Cause was issued on that date to be heard March 25, 1954.

April 1, 1954— Judge Westover filed a Memorandum wherein he indicated that the Impound Order was valid, but that it could not

	be reviewed in the District Court at that time, because administrative remedies would not be exhausted until there had been a final determination by the Post Office Department, and that the District Court therefore did not have jurisdiction.
April 12, 1954—	Appellant filed a Notice of Appeal from Judge Westover's Memorandum and made a motion in this Court for relief from the Impound Order.
April 13, 1954—	Judgment of Dismissal was entered in the District Court based on Judge Westover's Memorandum.
April 30, 1954—	Initial decision of the Post Office Hearing Examiner was entered and appealed from by appellant.
May 7, 1954—	This Court decided to hold appellant's motion in abeyance for ninety days from March 17, 1954 (the date of the administrative hearing) to give the Post Office Department to and including June 15, 1954, within which to make and enter a final and judicially reviewable order or determination. Thereafter appellant applied to Justice Douglas as Circuit Justice for relief from the Impound Order.
May 22, 1954—	Justice Douglas denied relief on the ground that appellant must seek judicial review according to the orderly procedure which she is already following.

June 11, 1954—	The Post Office Department made and entered a final and judicially reviewable order instructing the Postmaster at Los Angeles to return all of appellant's mail to the senders thereof.
June 22, 1954—	Appellant filed a Complaint in the District Court (Stanard v. Olesen, No. 16866-PH) wherein appellant prayed for an Injunction and declaration of invalidity of both the Impound Order of March 1, 1954, and the Final Order of June 11, 1954. An Order to Show Cause was issued to be heard June 28, 1954.
June 28, 1954—	Order to Cause continued to July 12, 1954.
July 12, 1954—	Judge Hall took the case under submission.

Statutes Involved.

The pertinent statutes are: 5 U. S. C. A. 1009(a) and (c), and 39 U. S. C. A. 259(a).

5 U. S. C. A. 1009(a) and (c) provides as follows:

"Judicial Review of Agency Action.

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"Rights of Review.

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"Acts Reviewable.

"(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."

39 U. S. C. A. 259(a) provides as follows:

"Exclusion from Mails of Obscene, Lewd, etc., Articles, Matters, Devices, Things or Substances:

"Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for an obscene, lewd, lascivious, indecedent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

"(a) Instruct Postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to re-

> turn all such mail matter to the Postmaster at the office at which it was originally mailed, with the word 'unlawful' plainly written or stamped upon the outside thereof, and all such mail matter so returned to such Postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and . . ."

Summary of Argument.

The District Court Judgment dismissing the appellant's complaint should be affirmed for the following reasons:

1. The District Court did not have jurisdiction to review the Impound Order because it was not a final judicially reviewable order or determination.

2. The issuance of the Final Order by the Post Office Department renders this appeal moot.

3. The Postmaster General had and has authority to issue the Impound Order.

4. The power exercised by the Postmaster General in this case does not violate the Administrative Procedure Act.

5. The power exercised by the Postmaster General in this case does not violate the Due Process Clause of the Fifth Amendment nor the First Amendment.

ARGUMENT.

I.

The District Court Did Not Have Jurisdiction to Review the Impound Order Because It Was Not a Final Judicially Reviewable Order or Determination.

The applicable portions of the Administrative Procedure Act which make administrative decisions judicially reviewable have already been set forth in full under the heading "Statutes Involved." However, it is well to repeat here the pertinent portion thereof which expressly denies jurisdiction to the District Court in this case. That portion provides as follows: "Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon review of the final agency action."

On page 13 of her Brief, appellant is apparently trying to distinguish between the Impound Order and the other administrative proceedings which have taken place before the Post Office Department in this case. It is true that the original complaint was filed by the Solicitor, whereas the Impound Order was made by the Postmaster General. Still it is difficult to see how any distinction can be made. Clearly, the Impound Order, the hearing, and the Final Order are all part and parcel of the same administrative proceeding.

The Impound Order is in no way final. It does not direct the Postmaster at Los Angeles to return the mail to the senders thereof, as might be done under 39 U. S.

C. A. 259(a). It merely directs him to hold this mail pending a final determination. It is the Final Order made at a later date, after hearing, that gives final effect to the Impound Order. The final effect can be either to deliver the mail to the appellant, or to return it to the senders.

When the mail was impounded prior to final determination, this was nothing more than a preliminary, procedural, or intermediate agency action or ruling. Its only effect was to hold the rights of the parties in *status quo.* The final determination, alone, determined who was entitled to the mail, not the Impound Order. When the Final Order was made, then and then only was there any reviewable agency action. Until that time the District Court was simply without jurisdiction.

Appellant has argued on page 14 of her brief that 5 U. S. C. A. 1009(a) confers jurisdiction on the District Court in that a person is entitled to judicial review when adversely affected in fact by agency action. As already pointed out, the Impound Order does not adversely affect the appellant in that it does not order the mail returned to the senders, but merely holds it in *status quo* pending a final determination. Whether or not any interest of the appellant will be affected is purely speculative. In *Home Loan Bank Board v. Mallonee* (C. A. 9 1952) 196 F. 2d 336, Cert. Den. 345 U. S. 952 (1953), this Court held that a litigant is not entitled to judicial relief for supposed or threatened injury until prescribed administrative remedies have been exhausted.

II.

The Issuance of the Final Order by the Post Office Department Renders This Appeal Moot.

As we have pointed out under the heading "Statement of the Case," the Post Office Department has now made a final judicially reviewable order, directing the Postmaster at Los Angeles to return all of the mail impounded since March 1, 1954, and received after June 11, 1954, the date of the Final Order. That order now supersedes the Impound Order.

A complaint has been filed in the District Court on the Final Order, and in that complaint the appellant asks the District Court to take jurisdiction of all of the mail held since March 1, 1954. It is our position that the District Court could never acquire jurisdiction until the Final Order was made, and so did not acquire jurisdiction in the action which is the subject of this appeal.

In the new case now pending in the District Court, we have taken the position that the Court there should have jurisdiction over all of the mail, but that as long as this appeal is pending, this Court has jurisdiction until it decides that it has not. We therefore take the position here that the Final Order of the Post Office Department of June 11, 1954, renders this appeal moot, since the jurisdiction over all of the mail should properly be in the District Court in the second action now pending there.

III.

The Postmaster General Had and Has Authority to Issue the Impound Order.

The Postmaster General has authority, by virtue of 39 U. S. C. A. 259(a) to withhold delivery of mail to a person whenever it appears from evidence satisfactory to him that the mails are being used by that person in connection with obscene matter, either by sending obscene matter itself through the mail or by sending information as to where, how or from whom the same may be obtained.

That the Postmaster General may withhold mail prior to the holding of a hearing, prior to the conclusion thereof, and prior to the issuance of a final type order directing the return of the mail to the senders thereof, is not set forth in the statute in so many words, but the Courts have seen fit to imply this power in order to give effect to the statute.

In *Peoples United States Bank v. Gilson* (E. D. Mo. 1905) 140 Fed. 1, the Postmaster General had issued a fraud order stopping the plaintiff's mail on the basis of reports of Postal Inspectors. The plaintiff sought an injunction on the ground that the evidence was deficient. The Court denied the injunction, pointing out that the reports of the inspectors are entitled to great weight, and said at page 7: "The reports are, of necessity, evidence on which he will act. They make the reports, and their reports, in the language of the statute, was evidence sat-

isfactory to him, the Postmaster General, that the bank was engaged in a scheme to defraud. Then, and thereupon, the Postmaster General could have issued the 'fraud order'."

Wallace v. Fanning (S. D. Cal., 1953) unreported, No. 15499-T, is squarely in point. There, the plaintiff sought to enjoin the Postmaster at Los Angeles from impounding mail prior to hearing. Judge Yankwich, who heard the case during Judge Tolin's illness, denied the injunction and stated in his conclusions of law: "That under the powers given by Section 255 and 259(a), Title 39, U. S. C., the Postmaster General had a reasonable time while instituting administrative proceedings and holding a hearing on the evidence, to impound the mail addressed to W. A. Lee at the address mentioned—"

The cases cited by Appellant in support of her position are not determinative nor binding upon this question.

In the case of *Donnell Manufacturing Company v. Wyman,* (E. D. Mo. 1907) 156 Fed. 415, the Court did not hold that no mail could be withheld pending the issuance of such order, as urged by appellant, but said, at page 417:

> "This Court does not now hold that the Postmaster General cannot make needful orders pending the hearing and in furtherance of the hearing. It may or may not be that the Postmaster General or those acting in his name for a limited time can withhold the mail of the addressees. But this Court can reach no other conclusion than that for six weeks of time the mail cannot be withheld. A reasonable time only need be given the party for such hearing, and, if the party prolongs the hearing, it may be so that the Postmaster General can make proper orders to protect the public from schemes of swindlers."

Thus, if the time interval had been a shorter one, under the facts of the *Donnell Manufacturing Company* case, the Court might very well have held that the impounding was for a reasonable period.

The case of *Meyers v. Cheesman* (C. A. 6, 1909) 174 Fed. 783, cited by appellant, is not in point. In that case the lower Court made an order turning back to the plaintiff certain mail impounded prior to the fraud order, under the authority of the *Donnell Manufacturing Company* case, cited above, and ordered the mail to be held which was received by the Postmaster subsequent to the fraud order. The Postmaster defendant obeyed the trial Court's order, turned back all of the mail to the plaintiff, sought no *supersedeas,* but appealed the validity of the first part of the trial Court's order. On appeal, the Court held that the question was moot since it could not undo that which had already been done, and that even if the order were erroneous, there is no way the Court could make the plaintiff return delivered mail to the Postmaster.

In the case at bar, the Order of the Postmaster General impounding the mail was certainly for a reasonable period. The Order which is objected to by the plaintiff was issued on March 1, 1954, at the same time that a notice of hearing was served on plaintiff, noticing the hearing for March 17, 1954.

But aside from mere citation of authority, there are cogent reasons for imposing upon the Postmaster General the duty as well as the power to impound mail prior to hearing in order to protect the public interest in keeping obscene matter out of the mails.

Congress, in granting to the Postmaster General the power to impound mail prior to administrative hearing

under 39 U. S. C. A. 259(a), and the Courts, in upholding this power, have undoubtedly had in mind the obvious necessity of doing so, because of the possibility that so-called "fly-by-night" mail order operators might evade the law effectively if they could receive their mail pending an administrative hearing and final determination thereof. Certainly, Congress and the Courts must have visualized the situation whereby a person assumes a name, such as Male Merchandise Mart, sends out circulars inviting mail orders at a given address, and then receives these orders all within a period of a few months. If the Post Office could not impound those mail orders, they would all be received and filled before the administrative proceedings could be completed. At that point, the mail order operator would be completely indifferent to whatever result may be reached at the administrative hearing. He need only resume operations with a new name and address.

IV.

The Power Exercised by the Postmaster General in This Case Does Not Violate the Administrative Procedure Act.

Appellant has not cited any portion of the Administrative Procedure Act which prohibits the action taken by the Postmaster General in this case. There is no provision in that statute which specifically prohibits this action, and so if it does, that prohibition must be implied.

5 U. S. C. A. 1004 is the section which requires a hearing and notice thereof. It does not say that the Postmaster General or any other agency may not make an *ex parte* order pending the hearing, in order to preserve the *status quo*. It merely says that there must be an

agency hearing. We do not contend that the appellant is not entitled to a hearing at some time. Clearly, she has this right, and this right was afforded to her before any order was made to return the mail to the senders.

The cases cited by appellant do not support her contention. *Universal Camera Corporation v. The National Labor Relations Board,* 340 U. S. 474 (1951), involved only the question of the scope of judicial review of administrative findings. *United States v. Morton,* 338 U. S. 632 (1950), dealt with Section 3(a) of the Act, requiring an agency to publish a statement of its rules. In holding that the Federal Trade Commission had not violated the Act in that case, however, the Court said, at pages 646 and 648, that if there is statutory authority for the agency's action, objections thereto under the Administrative Procedure Act are taken in vain. In the case at bar the government necessarily contends that 39 U. S. C. A. 259(a) is statutory authority that the Postmaster General may impound mail prior to hearing. If that is so, there can then be no objection to this procedure under the Administrative Procedure Act.

V.

The Power Exercised by the Postmaster General in This Case Does Not Violate the Due Process Clause of the Fifth Amendment nor the First Amendment.

The appellant has further argued that the Impound Order takes property from her without due process of law. Certainly, if the Impound Order were final and if the appellant were not entitled to any hearing, there would be a denial of due process. Here, however, nothing is taken. The mail is simply held in *status quo* pending the

hearing. At the conclusion thereof, the mail is disposed of according to the result of that hearing. If the mail is ultimately returned to the senders, it is not returned by reason of the Impound Order, but rather by reason of the Final Order made pursuant to a hearing at which the appellant was accorded due process.

In *Walker, Postmaster General v. Popenoe* (C. A., D. C. 1945) 149 F. 2d 511, cited by the appellant, the majority opinion sustained the District Court in granting the plaintiff's motion for summary judgment. The majority also concurred in the concurring opinion of Justice Arnold that the Postmaster General could not impound mail without a hearing. The case is distinguishable on two grounds: One is that 39 U. S. C. A. 259(a) was not involved. The Postmaster General's action in that case was based on 18 U. S. C. A. 334 (now Sec. 1461), which is the criminal statute which simply declares obscene matter non-mailable. 39 U. S. C. A. 259(a) authorizes the Postmaster General to return mail upon evidence satisfactory to him. The other distinction is that in the *Walker* case, the Postmaster General held no hearing at any time. He merely attempted to withhold mail, based on his sole determination that the matter was obscene. Certainly the Fifth Amendment requires a hearing at some stage of the proceedings. Here due process was given to the appellant ten days after the Impound Order.

In *Reilly v. Pinkus,* 338 U. S. 269 (1949), cited by appellant, the Postmaster General had made no impound order and no order to hold the mail in *status quo* pending

a new hearing was requested by the government. Thus the issue in this case was no way involved.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 (1951), is also distinguishable from the case at bar. There the Attorney General had listed certain organizations as Communist without giving to them any opportunity for a hearing at any time. In the case here on appeal nothing was taken from the appellant until she had had full opportunity to present her case to the Postmaster General at the hearing.

The appellant has also made strong arguments for the position that this power of the Postmaster General restricts the right of free speech under the First Amendment. It is elementary that this right is not absolute. Further, beyond the usual restrictions on free speech, the right to use the mails is a privilege, which Congress may make conditional.

In *Hannegan v. Esquire, Inc.*, 327 U. S. 146 (1946), cited by appellant, the Court was concerned only with the question of whether or not Congress could delegate to the Post Office Department the power to determine the right to Second Class mailing privileges based on a determination of whether a publication was good or bad for the public in its dissemination of information as to literature, the sciences, arts, or some special industry. The Court held that this power could not be delegated because it would in effect give the Post Office Department the power of censorship of the press. However,

in so holding, the Court was careful to point out that its decision was limited to matter which was questionable as good or bad literature. At page 158 the Court said: "The validity of the Obscenity Law is recognition that the mails may not be used to satisfy all tastes, no matter how perverted."

39 U. S. C. A. 259(a) was enacted in 1950, and its constitutionality has not yet been litigated. However, 39 U. S. C. A. 259, which authorizes the Postmaster General to issue fraud orders, has been in effect since 1890. In *Donaldson v. Read Magazine,* 333 U. S. 178 (1948), the constitutionality of that statute was questioned with reference to the First, Fourth, Fifth, Sixth and Eighth Amendments. The Court said at page 190:

> "All of the foregoing statutes, and others which need not be referred to specifically, manifest a purpose of Congress to utilize its powers, particularly over the mails and in interstate commerce, to protect people against fraud. This governmental power has always been recognized in this country and is firmly established. The particular statutes here attacked have been regularly enforced by the executive officers and the Courts for more than half a century. They are now part and parcel of our governmental fabric. This Court, in 1904, in the case of *Public Clearing House v. Coyne,* 194 U. S. 497, sustained the constitutional power of Congress to enact the laws. The decision rejected all the contentions now urged against the validity of the statutes in their entirety, insofar as the present contentions have any possible merit. No decision of this Court, either before or after the *Coyne* case, has questioned the power of Congress to pass these laws."

39 U. S. C. A. 259(a) now gives the Postmaster General the power to issue obscenity as well as fraud orders. In view of the fact that *Donaldson v. Read Magazine* is a recent case, and in view of the language of that opinion, it is very unlikely that the Court will reverse its position on the fraud orders. If it does maintain that position, the only possible argument is that fraud and obscenity are distinguishable. However, 18 U. S. C. A. 334 (now Sec. 1461), making the mailing of obscence matter a crime, has been in effect since 1876. It has been held constitutional. *United States v. Rebhuhn* (C. A. 2, 1940), 109 F. 2d 512, cert. den., 310 U. S. 629 (1940); *Tyomies Publishing Company v. United States,* (C. C. A. 6 1914), 211 Fed. 385.

In her discussion of the right of free speech, the appellant has also raised and emphasized the fact that the actual obscene articles were not before the Postmaster General at the hearing, but only the advertising. *United States v. Rebhuhn,* 109 F. 2d 512 (C. A. 2, 1940), is similar to the case at bar. That was a criminal case under 18 U. S. C. A. 334 (now Sec. 1461) for sending obscene matter or sending information as to how the same may be obtained through the mail. Both the advertising and the material advertised were in evidence. The Court held that although the material advertised was not obscene in itself, the statute was violated because the advertising was designed to appeal to the prurient or salaciously disposed type of person.

Conclusion.

The decision of the District Court should be sustained on both grounds:

1. The Court was without jurisdiction to review the Impound Order.

2. If the Court did have jurisdiction to review the Impound Order, the Impound Order was and is valid.

This appeal should be dismissed because the Final Order supersedes the Impound Order and renders the appeal moot.

Respectfully submitted,

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